Supreme Court, U.S.
FILED
AUG 19 1996
CLERK

No. 95-1649

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF KANSAS,

Petitioner,

v.

LEROY HENDRICKS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Kansas

BRIEF OF THE MENNINGER FOUNDATION, THE AMERICAN ALLIANCE FOR RIGHTS AND RESPONSIBILITIES, JUSTICE FOR ALL, THE NEW YORK CHAPTER OF PARENTS OF MURDERED CHILDREN, PROTECTING OUR CHILDREN, PEOPLE AGAINST VIOLENT CRIME, VICTIMS OUTREACH, INC., AND TEXANS FOR EQUAL JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Of Counsel:
ROBERT TEIR
General Counsel
American Alliance for Rights & Responsibilities
1146 19th Street, N.W.
Suite 250
Washington, D.C. 20036
(202) 785-7844

PHILIP ALLEN LACOVARA
Counsel of Record
MICHAEL E. LACKEY, JR.
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

JAMES C. GEOLY
RYAN D. MEADE
Mayer, Brown & Platt
190 S. La Salle Street
Chicago, IL 60603
(312) 782-0600

41PP

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
I. THE DUE PROCESS CLAUSE DID NOT ABROGATE THE POWER OF THE STATES TO CONFINE CIVILLY THOSE PERSONS WHO, BASED ON CONTEMPORARY MEDICAL KNOWLEDGE, POSE A DANGER TO SOCIETY AND COULD BENEFIT FROM TREATMENT.	5
A. The Principle Upon Which the Kansas Law Is Based — the Government's Power to Protect Society From Persons Afflicted With Dangerous Physical or Mental Conditions — Has Substantial Historical Roots.	5
B. Civil Confinement Has Been Used to Protect Society or the Individual from Harm Threatened by Mental Disorders.	7
II. THE KANSAS STATUTE IS CONSISTENT WITH THIS COURT'S CIVIL COMMITMENT JURISPRUDENCE.	14
A. The Act Invokes the Power to Confine Those Persons Who, Based on Contemporary Medical Knowledge, Pose a Serious Danger to Society and Who May Benefit From Professional Mental Health Treatment.	14
B. The Kansas Legislature Had the Power, Based on Current Medical Knowledge, to Conclude That Sexually Violent Predators are Dangerous and Suffer From a Condition That Could Benefit From Professional Mental Health Treatment .	16

TABLE OF CONTENTS — Continued

Page

C. The Act is Constitutional Because the Nature and Duration of the Civil Commitment Are Reasonably Related to Legitimate State Interests. 18

D. There is No Constitutional Significance to the Phrase "Mental Illness." 22

E. There Are Medically Recognized Treatments For SVPs. 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

Cases

Addington v. *Texas*, 441 U.S. 418 (1979) 15, 22

Ake v. *Oklahoma*, 470 U.S. 68 (1985) 23

Andersen v. *State*, 43 Conn. 514 (1876) 12

Barefoot v. *Estelle*, 463 U.S. 880 (1983) 17

Baxstrom v. *Herold*, 383 U.S. 107 (1966) 21, 25

Boswell v. State, 63 Ala. 307 (1879) 12

Colby v. *Jackson*, 12 N.H. 526 (1842) 6

Commonwealth v. Mosler, 4 Pa. 264 (1846) 12

Compagnie Francaise v. *Louisiana State Bd. of Health*, 186 U.S. 380 (1902) 6

Foucha v. *Louisiana*, 504 U.S. 71 (1992) 17-20, 22-25

Greenwood v. *United States*, 350 U.S. 366 1956) 20

Humphrey v. *Cady*, 405 U.S. 504 (1972) 24, 25

In re Hendricks, 912 P.2d 129 (Kan. 1996), cert. granted, 116 S. Ct. 2522 (1996) 22

In re James Barker, 2 Johns. Ch. 232 (N.Y. Ch. 1816) 15

Jackson v. Indiana, 406 U.S. 715 (1972) 20, 23, 25

Jacobson v. *Massachusetts*, 197 U.S. 11 (1905) 6, 29

TABLE OF AUTHORITIES — Continued

Page

Jones v. *United States*, 463 U.S. 354 (1983) 15, 18

Keleher v. *Putnam*, 60 N.H. 30 (1880) 6

Kennedy v. *Uniake*, 20 So. 749 (La. 1896) 13

Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. *United States*, 136 U.S. 1 (1890) 15

Look v. *Dean*, 108 Mass. 116 (1871) 6

Minnesota ex rel. Pearson v. *Probate Court*, 309 U.S. 270 (1940) 22

Montana v. *Egelhoff*, 116 S. Ct. 2013 (1996) 2, 4

O'Connor v. *Donaldson*, 422 U.S. 563 (1975) 18

Osborn v. *Thomson*, 103 Misc. 23 (Sup. Ct. N.Y. 1918) 13

Parsons v. *State*, 2 So. 854 (Ala. 1887) 13

Patterson v. *New York*, 432 U.S. 197 (1977) 4

Powell v. *Texas*, 392 U.S. 514 (1968) 25

Railway Express Agency, Inc. v. *Virginia*, 358 U.S. 434 (1959) 24

Schall v. *Martin*, 467 U.S. 253 (1984) 17

Scott v. *Commonwealth*, 61 Ky. (4 Met.) 227 (1863) 12

TABLE OF AUTHORITIES — Continued

Page

United States v. *Salerno*, 481 U.S. 739 (1987) 15, 17

Constitutional Provisions

U.S. Const. Amend. V 5

U.S. Const. Amend. XIV 2, 6, 12, 29

Statutes and Rules

ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, 1796-97 (1896) 8

ARIZ. REV. STAT. ANN. §§ 13-4601 to 13-4609 (1996) 13

CAL. WELF. & INST. CODE §§ 6600-6608 (West 1996) 13

FED. R. EVID. 404(b) 17

FLA. STAT. ANN. §§ 775.21-775.23 (West 1995) 13

IOWA CODE ANN. §§ 709C.1-709C.12 (West Supp. 1996) 13

KAN. STAT. ANN. § 59-29a01. . . . . 14, 19

KAN. STAT. ANN. § 59-29a02 . . . . . 19, 20, 25

KAN. STAT. ANN. § 59-29a02(a) 14, 22

KAN. STAT. ANN. § 59-29a02(b) 14

KAN. STAT. ANN. § 59-29a07 . . . . . 19, 20, 25

KAN. STAT. ANN § 59-2901 to 59-2944 14

TABLE OF AUTHORITIES — Continued

Page

KAN. STAT. ANN. § 59-2902(h) 22, 25

KAN. STAT. ANN. § 59-2917(f) 25

MINN. STAT. § 253B.02(7a) (Supp. 1995) 13

N.Y. LAWS ch. 31 (Feb. 9, 1788) 8

Pub. L. No. 103-322, § 320935, 108 Stat. 1796 (1994) 17

WASH. REV. CODE ANN. §§ 71.09.010-71.09.902 (West 1992 & Supp. 1995) 13

WIS. STAT. ANN. §§ 980.015-980.13 (West Supp. 1994) 13

Miscellaneous

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) 23

BEIS, MENTAL HEALTH AND THE LAW (1984) 7, 8

Blacher, *Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889 (1995) 13

BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769) 5, 6

TABLE OF AUTHORITIES — Continued

Page

Blakey, *The Indefinite Civil Commitment of Dangerous Sex Offenders Is An Appropriate Legal Compromise Between "Mad" and "Bad" — A Study of Minnesota's Sexual Psychopathic Personality Statute*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227 (1996) 21

BRAKEL, ET AL., THE MENTALLY DISABLED AND THE LAW (3d ed. 1985) 8, 9, 13

C.J.S. *Habeas Corpus* § 133 (1976) 6

CARROLL, THROUGH THE LOOKING GLASS (Macmillan ed. 1928) 25

Coleman, et al., *An Exploratory Study of the Role of Psychotropic Medications in the Treatment of Sex Offenders*, 18 J. OF OFFENDER REHABILITATION 76 (1992) 28

COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1st ed. 1868) 6

Cooter, *Phrenology and British Alienists*, in MADHOUSES, MAD-DOCTORS, AND MADMEN (1981) 10

DALTON, THE COUNTREY JUSTICE (1655) 5

Dershowitz, *The Psychiatrist's Power in Civil Commitment: A Knife that Cuts Both Ways*, 2 PSYCHOL. TODAY 43 (1969) 23

DEUTSCH, THE MENTALLY ILL IN AMERICA (5th prtg. 1965) 7-9, 11

TABLE OF AUTHORITIES — Continued

Page

Donne, *Meditation*, in DEVOTIONS UPON EMERGENT OCCASIONS (1624) 5

French & Vollman, Jr., *Treating the Dangerous Sex Offenders: A Clinical/Legal Dilemma*, 31 INT'L J. OF OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 62 (1987) 27

Gendreau & Ross, *Revivification of Rehabilitation: Evidence From the 1980s*, 4 JUST. Q. 349 (1987) 29

GROB, MENTAL INSTITUTIONS IN AMERICA: SOCIAL POLICY TO 1875 (1973) 8-11, 24

GROB, THE STATE AND THE MENTALLY ILL (1966) . 9-11

GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30S TO THE 80S (1977) 13

Henderson & Kalichman, *Sexually Deviant Behavior and Schizotypy: A Theoretical Perspective With Supportive Data*, 61 PSYCHIATRIC Q. 273 (1990) 19, 29

HOLMES, MEDICAL ESSAYS 1842-1882 (1891) 24

Letter from Tom Locke, Ph.D, Kansas Psychological Ass'n to Senator Marge Petty (Feb. 3, 1994) 19, 28

Marshall, et al., *Treatment Outcome with Sex Offenders*, 2 CLINICAL PSYCHOL. REV. 465 (1991) 28

Note, *Moral Insanity*, 10 F. 189 (1882) 13

TABLE OF AUTHORITIES — Continued

Page

Pfafflin & Friedemann, *What is in a Symptom? A Conservative Approach in the Therapy of Sex Offenders*, 18 J. OF OFFENDER REHABILITATION 16 (1992) . . 27

Priest, et al. *Counseling Adult Sex Offenders: Unique Challenges and Treatment Paradigms* in 71 J. OF COUNSELING & DEVEL. 27 (1992) 26, 28

Quinn, *Civil Commitment and the Right to Treatment Under the European Convention on Human Rights*, 5 HARV. HUM. RTS. J. 1 (1992) 15

Quinsey & Earl, *The Modifiable Sexual Preference* in HANDBOOK OF SEXUAL ASSAULTS: ISSUES, THEORIES AND TREATMENT OF THE OFFENDER (W.L. Marshall, et al. eds. 1990) 28

RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY (1838) 10, 11, 21

RAY, MENTAL HYGIENE (1863) 10, 11

Schwartz, *Effective Treatment for Sex Offenders*, 22 PSYCHIATRIC ANNALS 315 (1992) 26-28

Senator Bob Vancrum, Testimony to the State of Kansas Senate Judiciary Committee (Feb. 22, 1994) 20

WEXLER, MENTAL HEALTH LAW: MAJOR ISSUES (1981) 24

WHARTON, WHARTON & STILLE'S MEDICAL JURISPRUDENCE (3d ed. 1873) 10-12

TABLE OF AUTHORITIES — Continued

Page

Wiederholt, *The Psychodynamics of Sex Offenses and Implications for Treatment*, 18 J. OF OFFENDER REHABILITATION 20 (1992) 26

William Raspberry, *Castration Anxiety*, WASH. POST, Apr. 12, 1996, at A25 . . . 16

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1649

STATE OF KANSAS,

Petitioner,

v.

LEROY HENDRICKS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Kansas

BRIEF OF THE MENNINGER FOUNDATION, THE AMERICAN ALLIANCE FOR RIGHTS AND RESPONSIBILITIES, JUSTICE FOR ALL, THE NEW YORK CHAPTER OF PARENTS OF MURDERED CHILDREN, PROTECTING OUR CHILDREN, PEOPLE AGAINST VIOLENT CRIME, VICTIMS OUTREACH, INC., AND TEXANS FOR EQUAL JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The Menninger Foundation is a Kansas nonprofit corporation that operates the Menninger Clinic in Topeka, Kansas. The Menninger Clinic ("Menninger") was founded in 1925 and is now one of the nation's foremost psychiatric hospitals, consistently ranked as one of the top two psychiatric hospitals in the country by a *U.S. News & World Report* national survey of psychiatrists. Menninger provides a continuum of care to patients from all over the country, including patients who suffer from the types of mental abnormalities and personality disorders that the Kansas statute was enacted to address. Menninger can offer a uniquely informed perspective regarding the current state of the art in the diagnosis and treatment of sexually violent predators.

The American Alliance for Rights and Responsibilities ("AARR") is a national nonprofit organization founded to foster civic and community life and to promote individual responsibility. AARR has promoted and defended a variety of measures designed to improve the quality of urban life, focusing on measures targeted at reducing crime. AARR has previously appeared as *amicus curiae* in *Montana* v. *Egelhoff*, 116 S. Ct. 2013 (1996).

Justice for All is a national nonprofit volunteer organization, and Texans for Equal Justice is a state nonprofit volunteer organization. Both organizations are committed to the promotion of the rights and security of law-abiding citizens.

Parents of Murdered Children, New York Chapter, is a local chapter of a national organization formed to provide support for the surviving families of murder victims. Victims Outreach, Inc. is a nonprofit volunteer organization in Texas that assists persons who are victims of violent crime. Both organizations support public policies that help to protect families and children from violence.

Protecting Our Children is a volunteer organization in New York State that promotes legislation that will help protect children from violent crime, such as "Megan's Law" (a statute requiring community notification when certain categories of convicted sex offenders are released into the community).

People Against Violent Crime is a Texas state organization organized with the purpose of seeking ways to reduce violent crime.

SUMMARY OF ARGUMENT

The first duty of government is to take reasonable measures to protect the public health and safety of its citizens. Reflecting settled English doctrine, American law at the time the Constitution was first adopted, as well as at the adoption of the Fourteenth Amendment, recognized both the power and the responsibility of the public authorities to confine persons whose medical or mental conditions posed a grave risk of injuring other persons. That contemporaneous practice guides the inquiry whether civil commitment of persons afflicted with dangerous diseases or abnormalities satisfies the guarantee of due process.

Kansas enacted the Sexually Violent Predators Act (the "Act" or the "SVP Act") to provide civil commitment and treatment for sexually violent predators ("SVPs"), defined by the Act as persons having certain mental abnormalities or personality disorders that make them dangerous to others. The law is not novel in that it reaches patients who historically could have been civilly committed under other statutes. The Act, however, represents Kansas' attempt to refine its civil commitment system to provide optimum mental health treatment and complementary procedures for two very different types of mental health patients, SVPs and the "mentally ill," as defined under Kansas' other civil commitment statute.

The SVP Act is consistent with the basic principle that has formed the cornerstone of American civil commitment law: it limits involuntary commitment to dangerous persons who, according to contemporary medical knowledge, have a condition that may benefit from the type of professional mental health treatment provided by the State. Civil commitment under these circumstances fits within the Constitution's guarantee of due process, since the nature of the commitment bears a reasonable relation to the purpose for which the individual is committed.

Kansas has attempted to strike an appropriate balance between its obligation to protect its citizens from sexual violence to manage adequately scarce state mental health resources. The State also has endeavored to ensure that SVPs are treated fairly in light of current psychiatric knowledge and prevailing notions of culpability. By permitting, in some cases, incarceration followed by civil commitment (instead of longer periods of incarceration), the State has recognized that SVPs are responsible for their harmful conduct, unlike the insane, but that SVPs may be less culpable than others, because SVPs suffer from a mental affliction that makes them less able to resist certain criminal impulses.

Neither does the Constitution or prevailing historical practice restrict State civil commitment power to conditions that fit some technical definition of "mental illness." Adopting such an approach would inexorably wed the constitutionality of civil commitment statutes to a single phrase — "mental illness" — thereby elevating that term to the status of "magic words." That course would be imprudent, since it would render State statutes hostage to the changing classifications used by the psychiatric profession, rigidly tie a constitutional principle to one view held by some in that profession, and unnecessarily limit the States' flexibility to craft policy that, in light of prevailing psychiatric knowledge and ideas of criminal culpability, balances their obligation to protect society, to deter criminal conduct, and to assist those who need help to help themselves.

The mental health profession only now is beginning to understand the complex and myriad factors that induce persons to engage in the type of antisocial behavior defined by the Act. Understandably then, there is some disagreement among psychiatrics as to how best to treat SVPs. There is virtually no disagreement among mental health professionals, however, that such persons could benefit from some form of professional mental health treatment. Deciding how best to resolve disagreements of this sort is a matter of legislative policy judgment, not a matter of constitutional dimension.

To violate substantive due process, the Act must violate some principle "'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Montana* v. *Egelhoff*, 116 S. Ct. 2013, 2015 (1996) (Scalia, J., plurality opinion) (quoting *Patterson* v. *New York*, 432 U.S. 197, 202 (1977)). But the Kansas legislature's decision to authorize custodial treatment of those persons who pose a danger to society and are in need of professional mental health treatment fits comfortably within this country's historical and contemporary practice — and is consistent with the fundamental principles that justify civil infringements of individual liberty generally. Due process demands no more.

I. THE DUE PROCESS CLAUSE DID NOT ABROGATE THE POWER OF THE STATES TO CONFINE CIVILLY THOSE PERSONS WHO, BASED ON CONTEMPORARY MEDICAL KNOWLEDGE, POSE A DANGER TO SOCIETY AND COULD BENEFIT FROM TREATMENT.

A. The Principle Upon Which the Kansas Law Is Based — the Government's Power to Protect Society From Persons Afflicted With Dangerous Physical or Mental Conditions — Has Substantial Historical Roots.

Individual liberty must occasionally yield to the State's obligation to protect its citizens, either from one another or from themselves. This central axiom of life in a civilized society raises a fundamental question — under what circumstances, outside of the criminal context, may a society restrict an individual's liberty for society's overall benefit? In answering this question, a page of history is surely worth a volume of philosophy and logic.

Blackstone stated that "every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish." 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *125 (1769). This is the legal consequence of John Donne's observation that "[n]o man is an island, entire of itself; every man is a piece of the continent, a part of the main." J. Donne, *Meditation*, in DEVOTIONS UPON EMERGENT OCCASIONS 17 (1624).

Because of the interdependence of individuals in a functioning society, by the time the Fifth Amendment's guarantee of "due process" was adopted it was well established that public authorities could confine persons who presented a grave threat to public health and safety. The founders of the American legal system knew that, for centuries, the law of England allowed magistrates and sheriffs to enforce confinement of carriers of dangerous diseases such as the plague. See, *e.g.*, R. DALTON, THE COUNTREY JUSTICE (1655) (one of six definitive legal treatises ordered by the Massachusetts General Court as a basis for framing the colony's first "Laws and Liberties"). Similarly, Blackstone reported that offenses "against the public *health* of the nation" reflected a "concern of the highest

importance," pointing specifically to statutes allowing civil authorities to order forcible confinement of "any person infected with the plague" as long as he remains "infectious." 4 BLACKSTONE at *161 (emphasis in original).

American practice has followed this principle of government throughout our constitutional history. The Colonies and then the States regularly exercised the power to confine persons afflicted with dangerous conditions until they no longer posed a menace to public health and safety. See generally 39 C.J.S. *Habeas Corpus* § 133 (1976) (discussing early cases). The Court, for example, has sustained quarantines and compelled vaccinations to protect the public from possible exposure to disease. See, *e.g.*, *Compagnie Francaise* v. *Louisiana State Bd. of Health*, 186 U.S. 380, 387 (1902) (quarantines); *Jacobson* v. *Massachusetts*, 197 U.S. 11, 30-31 (1905) (vaccinations). In the same year in which the Fourteenth Amendment was adopted, Cooley described such "quarantine regulations and health laws" as an inherent manifestation of "the police power of the States." T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 584 (1st ed. 1868).

The law also authorized private citizens to use force to protect the community as well as the individual from imminent danger. By the middle of the nineteenth century, for example, it was well-settled that a private person, without warrant, could lawfully "restrain a person who is fighting, or doing mischief, or disturbing a congregation, or has fallen in a fit, or is so sick as to be helpless, or is unconsciously going into great danger, or is drunk, or has delirium tremens." *Look* v. *Dean*, 108 Mass. 116, 120 (1871) (citing *Colby* v. *Jackson*, 12 N.H. 526, 530 (1842)); *Keleher* v. *Putnam*, 60 N.H. 30, 31 (1880) (noting the right "to seize and restrain any person incapable of controlling his own actions, whose being at large endangers the safety of others"). Thus, our law has always recognized that the States, and in certain circumstances individual citizens, have the authority to detain civilly those who presented a danger to public health and safety — without distinguishing between whether the threat was from contagious diseases or other physical or mental conditions. It is into this broad fabric of law that the thread of civil commitment is woven.

B. Civil Confinement Has Been Used to Protect Society or the Individual from Harm Threatened by Mental Disorders.

Our society has consistently asserted the power to prctect its citizens against any palpable danger, including danger flowing from a person's mental or psychological disorders. Changing times have witnessed changes in our understanding of underlying causes of dangerous mental disorders and effective responses to them, but society has been consistent in asserting the power and assuming the responsibility to address such threats by compulsion, if necessary.

1. *Civil Commitment for the Protection of Society.* During the Colonial period, governmental power, "in so far as it was extended to the mentally ill, was mainly directed to the problem of safely disposing of violent cases. Incarceration in jail was the common solution." A. DEUTSCH, THE MENTALLY ILL IN AMERICA 41 (5th prtg. 1965). A 1676 Massachusetts Act is typical of the civil commitment statutes applicable during this period:

> "Whereas, There are distracted persons in some tounes, that are unruly, whereby not only the familyes wherein they are, but others suffer much damage by them, it is ordered by this Court and the authoritye thereof, that the selectmen in all tounes where such persons are are hereby impowred & injoyned to take care of all such persons, that they doe not damnify others." DEUTSCH, *supra*, at 43; see also E.B. BEIS, MENTAL HEALTH AND THE LAW 3 (1984).

Confinement typically was imposed until the "distracted" person was no longer a threat to the community. The York County, Virginia, records of 1689, for example, recall an order pertaining to a "madman," John Stock,

> "whoe keepes running about the neighborhood day and night in a sad Distracted Condition to the great Disturbance of the people, therefore for the prevention of his doeing any further Mischeife It is Ordered by the Court that Mr. Robt. Read, High Sherr: doe take Care that the said Stock bee Lade hold of and safely kept in some close Roome, where hee shall not bee suffered to go abroad until hee bee in a better condition to Governe himselfe, and that ye said Robert Read is to pvide

such helps as may bee Convenient to Looke after him." DEUTSCH, *supra*, at 43.

Similarly, in 1720, one Henry Dove, "a Dangerous Madman," was ordered incarcerated in New York City jail "untill he shall Recover his senses." *Id.* at 42; see also S.J. BRAKEL, ET AL., THE MENTALLY DISABLED AND THE LAW 12 (3d ed. 1985). As these orders illustrate, commitment in Colonial America was not used for the purpose of treatment, but rather was merely a custodial device to deal with "community nuisances" that endangered the colonists' way of life. See BEIS, *supra*, at 3; BRAKEL, ET AL., *supra*, at 12.

Preventive detention of the dangerously disturbed remained the general rule in the States when the Constitution was adopted. In 1788, for example, New York enacted the following civil commitment law:

> "'*Whereas*, There are sometimes persons who by lunacy or otherwise are furiously mad, or are so far disordered in their senses that they may be dangerous to be permitted to go abroad; therefore
>
> *Be it enacted*, That it shall and may be lawful for any two or more justices of the peace to cause such person to be apprehended and kept safely locked up in some secure place, and, if such justices shall find it necessary, to be there chained. . . .'" DEUTSCH, *supra*, at 420 (quoting 1788 N.Y. LAWS ch. 31 (Feb. 9, 1788)).[1]

Terms such as "distracted person," "lunacy," and "mad" in early civil commitment statutes did not limit the reach of those statutes to particular forms of mental illness that threatened the lives and property of others. At the beginning of the nineteenth

[1] In 1797, Massachusetts enacted a virtually identical law, entitled "An act for suppressing Rogues, Vagabounds, Common Beggars and other idle, disorderly and lewd Persons," which authorized commitment to a house of correction of any person "'[l]unatic & so furiously mad as to render it dangerous to the peace or the safety of the good people, for such lunatic person to go at large.'" G. GROB, MENTAL INSTITUTIONS IN AMERICA: SOCIAL POLICY TO 1875 9 (1973) (quoting ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, 1796-97 451 (1896)); DEUTSCH, *supra*, at 420.

century, society knew very little about the diagnosis or treatment of mental illnesses. See DEUTSCH, *supra*, at 24-31, 52-54. The terms in these statutes, therefore, were interpreted quite broadly and were read to allow for the civil commitment of virtually any type of dangerous conduct that substantially deviated from the normal standards of rational behavior. See G. GROB, THE STATE AND THE MENTALLY ILL 7 (1966) [hereinafter "STATE AND MENTALLY ILL"]; cf. BRAKEL, ET AL., *supra*, at 14 (stating that the New York "legislators considered the asylums to be primarily for the care of those violent persons who could not be cared for privately").

The lax diagnostic requirements for admission to the asylums were undoubtedly the byproduct of a lack of mental health knowledge and the then-dominant belief of the health profession that "insanity was an incurable affliction." See DEUTSCH, *supra*, at 132. The crucial point, though, is that the law broadly and consistently recognized, reflecting the then-limited understanding of psychiatry, that "insane asylums" were to be used not necessarily to treat the sick but to isolate the incorrigibly violent from the community.

2. *"Moral Insanity" as a Basis for Civil Commitment.* The early to mid-nineteenth century was marked by a fundamental change in attitudes and the intellectual climate regarding mental illness. To keep up with an increased number of people requiring civil commitment, States built new asylums. This, in turn, raised the visibility of civil commitment as a public issue, which resulted in new laws governing the commitment process.

The increased number of public facilities also spawned growth in the nascent profession. In 1844, the superintendents from thirteen asylums formed The Association of Medical Superintendents of American Institutions for the Insane, which ultimately became the American Psychiatric Association ("APA"). G. GROB, MENTAL INSTITUTIONS IN AMERICA: SOCIAL POLICY TO 1875 135, 137 (1973) [hereinafter "MENTAL INSTITUTIONS"]; BRAKEL, ET AL., *supra*, at 15 & n.35. The founding of the APA encouraged research into and debate about the diagnosis and treatment of mental disease. Old notions of insanity as the result of demonic possession gave way to a "somatic" interpretation that linked mental health with the physical condition of the brain,

especially the presence or absence of "lesions of the brain." See STATE AND MENTALLY ILL, *supra*, at 7-8, 51; I. RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 135-136 (1838) [hereinafter "MEDICAL JURISPRUDENCE"]; MENTAL INSTITUTIONS, *supra*, at 151-156.

This psychiatric theory was supported, in part, by the widespread acceptance of phrenology, which had taken root in the United States during the mid-nineteenth century. Phrenologists instructed that each function and propensity was located in a different region of the brain. "Each particular moral instinct had its own subchamber, in which it dwells in like seclusion, so that insanity on its part not only does not affect the mental properties, but is not necessarily communicated to its fellow instincts and affections." 1 F. WHARTON, WHARTON & STILLE'S MEDICAL JURISPRUDENCE § 567, at 551; see *Preface to id.* at vii-x, *id.* § 320, at 317-326 (3d ed. 1873) (discussing phrenology); see also MENTAL INSTITUTIONS, *supra*, at 152-153; R. Cooter, *Phrenology and British Alienists*, in MADHOUSES, MAD-DOCTORS, AND MADMEN 58-104 (1981).

"Moral insanity" was believed to be a disease separate and distinct from "intellectual insanity." By 1873, psychologists had identified numerous such manias, including "erotomania" or "aidoiomania" (morbid sexual - propensity),[2] pyromania, kleptomania, homicidal monomania, pseudonomania (morbid lying propensity), oikeiomania (morbid state of domestic affections), suicidal mania, dipsomania (morbid propensity for drink), fanatico-mania, religious insanity, and politico-mania. 1 WHARTON & STILLE, *supra*, §§ 578-679, at 561-671; see MEDICAL JURISPRUDENCE, *supra*, at 187-234. Those suffering from moral mania supposedly had an uncontrollable propensity to engage in the

[2] This mania is analogous to the type of mental abnormality or personality disorder defined by the SVP Act. 1 WHARTON & STILLE, *supra*, §§ 617-625, at 597-602 (citing various examples); see MEDICAL JURISPRUDENCE, *supra*, at 192-195 (defining "erotic mania" as an "affection, in a state of the most unbridled excitement, filling the mind with a crowd of voluptuous images, and ever hurrying its victim to acts of the grossest licentiousness, in the absence of any lesion of the intellectual powers").

particular type of conduct (and thus should not be held criminally responsible for that behavior), even though all other moral functions and intellectual capacity were normal. 1 WHARTON & STILLE, *supra*, § 567, at 551; see MEDICAL JURISPRUDENCE, *supra*, at 168-169; *id.* 187 (describing moral mania as prompting one "to action by a kind of instinctive irresistibility, and while he retains the most perfect consciousness of the impropriety and even enormity of his conduct, he deliberately and perserveringly pursues it").

Nevertheless, phrenologists thought that individuals could "deliberately and consciously cultivate different faculties by following the natural laws that governed physical development and human behavior." MENTAL INSTITUTIONS, *supra*, at 152. This belief, coupled with the somatic view of mental illness, encouraged psychiatrists to abandon their prior notion that mental disease was incurable, and a wave of optimism swept the profession. STATE AND MENTALLY ILL, *supra*, at 51-52; see DEUTSCH, *supra*, at 132-157. If moral insanity was caused by exposure to immoral or unhealthy environmental conditions, then it could be cured by moral treatment -- the immersion of the patient in a morally and environmentally healthy environment. See generally I. RAY, MENTAL HYGIENE (1863). Mental health specialists extolled the curative power of this so-called "moral treatment," and such methods were widely emulated in asylums in the United States throughout the mid-nineteenth century. See STATE AND MENTALLY ILL, *supra*, at 43-79.

These advances in the psychiatric profession were reflected in American law. Many courts adopted the psychiatrists' view that "moral insanity" could exculpate a person from criminal responsibility for his destructive behavior: acting out of an "irresistible impulse" rendered the actor "not guilty by reason of insanity," and thus the proper object of psychiatric confinement rather than criminal incarceration. In 1863, the Kentucky Supreme Court, for example, explained moral insanity and its legal effect as follows:

> "'[M]oral insanity arises from the existence of some of the natural propensities in such violence that it is impossible not to yield to them. * * *. Where its existence is fully established, this species of insanity relieves from accountability

to human laws.'" *Scott* v. *Commonwealth*, 61 Ky. (4 Met.) 227, 230 (1863) (quotation omitted).

See also *Commonwealth v. Mosler*, 4 Pa. 264, 267 (1846) (recognizing "a *moral* or *homicidal* insanity, consisting of an irresistible inclination to kill, or to commit some other particular offense"). Thirteen years later, in 1876, the Supreme Court of Connecticut relied on a finding of "moral mania" in *Andersen* v. *State*, 43 Conn. 514, 524 (1876), to reverse a capital sentence given to a convicted murderer. Three years later, the Alabama Supreme Court recognized moral insanity as a "species of mental disorder" although the court rejected its exculpatory value. *Boswell v. State*, 63 Ala. 307, 321 (1879). Both the Connecticut and Alabama courts recognized "moral insanity" as a form of mental illness, even though by 1873, some psychiatrists already were arguing against its acceptance as a viable psychiatric theory. Compare 1 WHARTON & STILLE, *supra*, §§ 552-566, at 528-551 (authorities repudiating doctrine) with *id.* §§ 542-551, at 516-528 (authorities maintaining doctrine).

3. *Sexually Violent Predation as a Ground for Civil Confinement.* As this survey demonstrates, from Colonial America through 1868 — when the Fourteenth Amendment was ratified — American legal principles authorized public authorities to confine persons who are today defined as SVPs under the Act. Until the first quarter of the nineteenth century, the perceived dangerousness of such a person, standing alone, would have been sufficient to warrant civil preventive detention. From that time forward, persons manifesting this kind of behavioral impulse could have been civilly committed as "morally insane" (a notion, however, that is now universally rejected by the psychiatric profession).

4. *Post-1868 Justifications for Civil Commitment.* Needless to say, there is no indication that the Congress or the States specifically intended to strip the States of this kind of custodial power when the Fourteenth Amendment was proposed and ratified. To the contrary, the consistent and widespread practice of the States after 1868 serves only to confirm that the Act is clearly within the State's power.

The States continued to maintain and use the general commitment statutes and rationales already discussed well into the

twentieth century, with the exception that psychiatrists and courts repudiated the existence and hence exculpatory value of moral mania. Note, *Moral Insanity*, 10 F. 189 (1882); see, *e.g.*, *Parsons* v. *State*, 2 So. 854 (Ala. 1887); *Kennedy* v. *Uniake*, 20 So. 749 (La. 1896); *Osborn* v. *Thomson*, 103 Misc. 23 (Sup. Ct. N.Y. 1918). In the 1930s, a burgeoning popular interest in turn-of-century studies of psychoanalysis and sexuality, many of which espoused the idea that "most types of sexual deviance should be dealt with by treatment, voluntarily or not," prompted many States to focus specifically on the problems caused by so-called "sexual psychopaths." GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30S TO THE 80S 851, 853 (1977) [hereinafter "GAP"]; R. Blacher, *Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 898-899 (1995). In 1937, Michigan became the first State to enact a "sexual psychopath law," which provided for the civil commitment and treatment of sexual psychopaths. The Michigan law "marked the beginning of a trend that peaked in the mid-1960s, by which time more than half the states had adopted" such laws. BRAKEL, ET AL., *supra*, at 739.

Some States repealed or modified these special commitment laws in the 1970s, many deciding, as a matter of legislative judgment, that voluntary treatment was more beneficial for the majority of sex offenders. *Id.* at 740. In 1984, however, sexual psychopath laws still existed in 16 States and the District of Columbia. *Ibid.* The trend toward repeal of such statutes recently reversed, as Kansas and at least seven other like-minded States[3] have enacted a new generation of sexual psychopath laws designed to address the problems caused by those who need custodial attention to avoid endangering themselves and others.

---

[3] See ARIZ. REV. STAT. ANN. §§ 13-4601 to 13-4609 (1996); CAL. WELF. & INST. CODE §§ 6600-6608 (West 1996); FLA. STAT. ANN. §§ 775.21-775.23 (West 1995); IOWA CODE ANN. §§ 709C.1-709C.12 (West Supp. 1996); MINN. STAT. § 253B.02(7a) (Supp. 1995); WASH. REV. CODE ANN. §§ 71.09.010-71.09.902 (West 1992 & Supp. 1995); WIS. STAT. ANN. §§ 980.015-980.13 (West Supp. 1994).

Neither history nor current practice, therefore, supports the argument that the civil commitment of persons defined as SVPs under the Act violates any principle so rooted in the traditions and conscience of our people as to be ranked as fundamental. To the contrary, the SVP Act was carefully crafted in accordance with the constitutional guideposts that the Court has provided over the years.

II. THE KANSAS STATUTE IS CONSISTENT WITH THIS COURT'S CIVIL COMMITMENT JURISPRUDENCE.

A. The Act Invokes the Power to Confine Those Persons Who, Based on Contemporary Medical Knowledge, Pose a Serious Danger to Society and Who May Benefit From Professional Mental Health Treatment.

Kansas defines an SVP as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." KAN. STAT. ANN. § 59-29a02(a). A mental abnormality is defined, in turn, as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." *Id.* § 59-29a02(b).

Kansas already had a statute addressing involuntary commitment of those defined as "mentally ill" (see *id.* § 59-2901 to 59-2944), but the legislature found that this civil commitment program was inadequate to address the unique characteristics and needs of SVPs. In the preamble to the 1994 Act, the Kansas legislature explained:

> "The existing involuntary commitment procedure * * * is inadequate to address the risk these [SVPs] pose to society. The legislature further finds that the prognosis for rehabilitating [SVPs] in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities." *Id.* § 59-29a01.

The legislature found that SVPs "generally have antisocial personality features which are unamenable to existing mental illness

treatment modalities and those features render them likely to engage in sexually violent behavior." *Ibid.* The legislature also noted the "high" likelihood that SVPs would engage in repeat acts of predatory sexual violence. By contrast, the legislature pointed out, that the existing civil commitment procedure was "intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community." *Ibid.* Kansas, therefore, enacted the SVP Act to provide for commitment of only those individuals who are shown, beyond a reasonable doubt, to be both dangerous and in need of professional mental health treatment, albeit a treatment different from that accorded to those found to be "mentally ill" under Kansas' other involuntary commitment statute.

Kansas' decision to provide a separate civil commitment system for SVPs who, in the State's view, need professional mental health treatment involves a policy judgment which the State is authorized to make. As discussed above (see 6-7), the Court has long held that the Constitution allows the States to impose various restraints on personal liberty to protect public health and safety or to treat the person restrained. The Court also has expressly sustained the power of civil commitment of the mentally ill who pose a danger to themselves or others, *Addington* v. *Texas*, 441 U.S. 418 (1979), and of automatic commitment of persons acquitted of crime by reason of "insanity," *Jones* v. *United States*, 463 U.S. 354 (1983). See also *United States* v. *Salerno*, 481 U.S. 739 (1987) (upholding preventive pre-trial detention of certain dangerous indictees).

States' civil commitment authority stems from their police power to protect the public from dangers caused by sexually dangerous persons. *Addington*, 441 U.S. at 426. States also are responsible as *parens patriae* to help those, such as sexual psychopaths, who need help to help themselves. *Ibid*; see *Late Corp. of the Church of Jesus Christ of Latter-Day Saints* v. *United States*, 136 U.S. 1, 57 (1890); see also *In re James Barker*, 2 Johns. Ch. 232, 237 (N.Y. Ch. 1816) (describing evolution of *parens patriae* in English common law).[4] Both powers are

---

[4] Civil commitment under these powers is recognized by the European Convention on Human Rights as well. G. Quinn, *Civil Commitment and*

implicated here. Respondent Leroy Hendricks admitted that he is a pedophile and, although he "hoped" that he would not have sexual contact with children after release, only by dying could he "guarantee" that he never would. See Resp. Conditional Cross Pet. at 8 (citing trial transcript). Kansas, under its police power, can protect society during the period when Hendricks cannot control himself from harming others. Kansas, pursuant to its responsibility as *parens patriae*, can provide Hendricks with professional mental health treatment so that he can learn to help himself.[5]

B. The Kansas Legislature Had the Power, Based on Current Medical Knowledge, to Conclude That Sexually Violent Predators are Dangerous and Suffer From a Condition That Could Benefit From Professional Mental Health Treatment.

1. *The Court Has Recognized the Ability of Professionals to Predict Future Dangerous Conduct.* The first critical element under the Act is the State's obligation to prove beyond a reasonable doubt that the alleged predator is likely to engage in the prohibited conduct. There is a split within the psychiatric community regarding the extent to which future dangerousness can be predicted. The Kansas legislature, aware of this disagreement of authority, chose to rely on the judgment of those professionals who believe that such conduct can be adequately ascertained. This is the type of policy judgment that is most worthy of judicial deference. In addition, limiting the ability of the States to use new, potentially beneficial treatment modalities until there is universal professional acceptance of their efficacy would hamstring the States' ability to address pressing social problems that endanger society.

---

the Right to Treatment Under the European Convention on Human Rights, 5 HARV. HUM. RTS. J. 1, 7 (1992).

[5] The inability of psychopaths to control themselves from engaging in behavior for which they subsequently feel remorse is highlighted by the widely reported plight of Larry Don McQuay, a convicted child molester, who is "begging the state of Texas to castrate him" to help him resist his urge to prey on children. William Raspberry, *Castration Anxiety*, WASH. POST, Apr. 12, 1996, at A25.

The Court already has recognized that, in light of medical advances and other evidentiary factors, the law may impose very substantial burdens on personal liberty based on a prediction that the person will engage in dangerous behavior in the future. *Schall* v. *Martin*, 467 U.S. 253, 278 (1984) (noting that predictions of future criminal conduct form "an important element in many decisions, and we have specifically rejected the contention * * * 'that it is impossible to predict future behavior and that the question is so vague as to be meaningless'"); see *Salerno*, 481 U.S. at 751 (quoting *Schall*). An assessment of future dangerousness, for example, is one factor used to determine whether a defendant should receive the death penalty for conviction of a capital crime. *Barefoot* v. *Estelle*, 463 U.S. 880, 896-903 (1983) (considering and rejecting argument "that psychiatrists, individually and as a group, are incompetent to predict with an acceptable degree of reliability that a particular criminal will commit other crimes in the future and so represent a danger to the community").

Congress itself recently acted on the basis of a similar determination that, with predatory sexual conduct of this sort, prior conduct is predictive of future behavior. In 1994, Congress directly amended the Federal Rules of Evidence to specify that, in any civil or criminal case in which a defendant is accused of child molestation, evidence that defendant previously committed an offense of child molestation will be admissible. Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135-2137 (1994), adding Rules 414 and 415. These legislatively formulated declarations of public policy supersede, in sex offense cases, the restrictive aspects of Rule 404(b). Thus, they illustrate the widespread professional consensus that prior incidents of child molestation are legitimately probative to show a defendant's propensity to commit additional acts of the same nature.

Most important, however, is the fact that this Court has previously considered, and rejected, the argument that predictions of future dangerousness are insufficiently reliable to base a decision regarding future civil commitment. *Foucha* v. *Louisiana*, 504 U.S. 71, 76 n.3 (1992) (noting that psychiatric opinion "is reliable enough to permit the courts to base civil commitments on clear and convincing medical evidence that a person is mentally ill and dangerous"). This is particularly true where, as with Hendricks,

there previously has been a judicial determination of criminal conduct. As Justice O'Connor has noted, such a conviction provides "'concrete evidence'" of the individual's dangerousness. *Foucha*, 504 U.S. at 87 (O'Connor, J., concurring) (quoting *Jones*, 463 U.S. at 364). And given the uncertainty of the present state of knowledge and therapy regarding mental disease, "'courts should pay particular deference to reasonable legislative judgments' about the relationship between dangerous behavior and mental illness." *Ibid.* (quoting *Jones*, 463 U.S. at 365 n.13).

C. The Act is Constitutional Because the Nature and Duration of the Civil Commitment Are Reasonably Related to Legitimate State Interests.

Assuming a "substantive" component to the due process clause, "[d]ue process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed." *Foucha*, 504 U.S. at 79. "Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. Equally important, confinement must cease when those reasons no longer exist." *O'Connor* v. *Donaldson*, 422 U.S. 563, 580 (1975) (Burger, C.J., concurring).

In *Foucha*, the Court held that the Due Process Clause of the Fourteen Amendment prevents a State from continuing to confine in a mental institution a person acquitted of a crime who has subsequently recovered his sanity, but is otherwise dangerous as a result of a different, but nonadjudicated personality disorder. Justice O'Connor's concurring opinion was crucial to the decision. She reasoned that the vice of the Louisiana statute was the potentially indefinite confinement in a mental hospital without any showing that the inmate belonged in that type of facility. Her opinion, however, explicitly suggested that she would sustain even some continued detention of an insanity acquitee who had recovered his sanity, if "the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquitee's continuing dangerousness." 504 U.S. at 87-88. The Act satisfies the *Foucha* formulation.

Kansas expressed two purposes justifying the legislation. First, Kansas sought to protect its citizens from the dangers posed

by sexual predators who, the legislature found, have a "high" likelihood of engaging in repeat acts of sexual violence if released. Although sexual predators comprise an extremely small number in our society, they present a danger disproportionate to their number. Many prey on children, the most innocent and vulnerable in the community, and there is mounting evidence that SVPs commit an unusually high number of crimes. Testimony of Carla J. Stovall, Parole Officer, before the State of Kansas Senate Judiciary Committee 1 (Feb. 22, 1994) (National Institute of Mental Health-funded study of 453 pedophiles reports that each had abused an average of 52 girls or 150 boys.); M.C. Henderson & S.C. Kalichman, *Sexually Deviant Behavior and Schizotypy: A Theoretical Perspective With Supportive Data*, 61 PSYCHIATRIC Q. 273, 273 (1990) (citing study in which self-reported child molesters had an average 72 victims each).

Second, Kansas sought to offer a form of mental health treatment different from that provided to persons adjudged "mentally ill" under its pre-existing civil commitment statute. This was needed, the legislature explained, because "[t]he treatment needs of [the sexual predators] are very long term," "the treatment modalities for this population are very different than the traditional treatment modalities," and they "generally have antisocial personality features which are unamenable to existing mental illness treatment modalities." KAN. STAT. ANN. § 59-29a01.

Civil commitment under the Act is reasonably related to achieving both goals. As for protecting the public, the statute carefully limits its application to only those persons who are shown beyond a reasonable doubt to have been convicted of or charged with one of the specifically defined sexually violent offenses and to suffer from a mental abnormality or personality disorder that makes that person, unless confined, likely to engage in predatory acts of sexual violence in the future. KAN. STAT. ANN. §§ 59-29a02, 59-29a07. These provisions ensure that the Act affects only a "small but extremely dangerous group." *Id.* § 59-29a01. Thus, this is a "sharply focused scheme" of the sort carefully distinguished in *Foucha*. 504 U.S. at 81.

By design, the Act is drafted so that the vast "majority of [sex] offenders would not need to be committed under this statute." Letter from Tom Locke, Ph.D, Kansas Psychological Ass'n to

Senator Marge Petty 2 (Feb. 3, 1994). According to Kansas State Senator Bob Vancrum, at the time of the statute's adoption, it was estimated that only 33 persons would be committed as SVPs under the Act. See Testimony from Senator Bob Vancrum to the State of Kansas Senate Judiciary Committee 2 (Feb. 22, 1994). Far from targeting all sex offenders, therefore, Kansas merely seeks to institutionalize those few, most dangerous sex offenders for treatment and for the protection of society.

The Act's reach is limited by requiring that the elements necessary for commitment are established by proof beyond a reasonable doubt (KAN. STAT. ANN. §§ 59-29a02, 59-29a07), that the mental condition of each person committed is examined annually (*id.* § 59-29a08), and that those committed may file a petition for discharge at any time (*id.* § 59-29a11). Once the person's mental abnormality or personality disorder has changed so that he is safe to be at large, he must be released. *Id.* § 59-29a07. Numerous procedural safeguards thus ensure a fair hearing and competent factfinding to support any commitment decisions.

The fact that modern medical evidence supports the conclusion that sexual predators can benefit from professional mental health treatment is another fundamental distinction between this case and *Foucha*, 504 U.S. at 82.[6] In *Foucha*, unlike here, there was "no effective treatment" for the patient's personality disorder; hence there was no reasonable relationship between Foucha's continued civil confinement in a mental hospital and the purposes for *that* kind of detention.[7]

---

[6] Even if the prevailing medical wisdom were that there is little likelihood of success in treating SVPs — which it is not — the Act still would pass constitutional muster, because due process does not demand some arbitrary level of probability of cure. *Jackson* v. *Indiana*, 406 U.S. 715, 725 (1972) (noting that civil commitment is not constitutionally barred for persons for whom prognosis was "'rather dim'"); see *Greenwood* v. *United States*, 350 U.S. 366, 375 (1956) ("The fact that at present there may be little likelihood of recovery does not defeat federal power to make this initial commitment of the petitioner.").

[7] Any argument that Kansas is not providing pertinent mental-health treatment is expressly refuted by the record. See J.A. 387, 453-54.

Neither is the Act unconstitutional because it results, in certain circumstances, in civil commitment after criminal incarceration. *Baxstrom* v. *Herold*, 383 U.S. 107, 110 (1966). Kansas unquestionably has the authority to impose life imprisonment upon those convicted of sexually violent crimes. The Constitution does not bar Kansas from eschewing harsher prison sentences for sex offenders in favor of lighter prison sentences followed by civil commitment and state-sponsored mental health treatment.

Indeed, Kansas' criminal/civil choice is quite reasonable and humane in light of current medical knowledge and well-established notions of criminal culpability. On the one hand, sexual predators can recognize the difference between right and wrong, and thus are susceptible to deterrence and worthy of the societal condemnation accompanying criminal conviction. On the other hand, because of SVPs' mental abnormalities or personality disorders, they may be less able than others to control their dangerous impulses and thus proper candidates for state-imposed custodial treatment. In a very real sense, then, SVPs are both "bad" and "mad". See K.P. Blakey, *The Indefinite Civil Commitment of Dangerous Sex Offenders Is An Appropriate Legal Compromise Between "Mad" and "Bad" — A Study of Minnesota's Sexual Psychopathic Personality Statute*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227 (1996).

In the nineteenth century, the law attempted to reconcile sexual psychopaths' bad/mad characteristics by developing the now-discredited concept of criminal exculpation based on moral mania. In the mid-twentieth century, States responded with sexual psychopathy laws. Kansas' criminal/civil scheme is merely the latest of these efforts designed to reconcile the fact that SVPs' characteristics make them imperfect candidates for either the traditional criminal or civil system. Kansas' response to this dilemma, the adoption of a criminal/civil approach, falls squarely within its authority to choose from among rational methods by which to protect society and to ensure that its citizens are treated

---

Even if Kansas was not fulfilling its undertaking, the appropriate response would be to require compliance with the Act, not a finding that the Act itself is unconstitutional.

consistent with their culpability as determined by contemporary psychiatric knowledge and societal mores. As the Court previously has recognized, "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington*, 441 U.S. at 431.

D. There is No Constitutional Significance to the Phrase "Mental Illness."

In striking down the Act, the Kansas Court misread this Court's precedents to require a finding of "mental illness" as a constitutional minimum for all civil commitment statutes. The Kansas Court found that "neither the language of the Act nor the State's evidence supports a finding that 'mental abnormality or personality disorder,' as used in 59-29a02(a), is a 'mental illness' as defined in 59-2902(h)." *In re Hendricks*, 912 P.2d 129, 138 (Kan. 1996), cert. granted, 116 S. Ct. 2522 (1996). "Absent such a finding," the court continued, "the Act does not satisfy the constitutional standard set out in *Addington* and *Foucha*." *Ibid.* According to the Kansas court, *Foucha* "stated that to indefinitely confine as dangerous one who has a personality disorder or antisocial personality but is not mentally ill is constitutionally impermissible. Similarly, to indefinitely confine as dangerous one who has a mental abnormality is constitutionally impermissible." *Ibid.*

The Due Process Clause of the Fourteenth Amendment draws no such distinction, however, and the Court has never held that a State may civilly commit only persons who have been adjudged, beyond a reasonable doubt, to be both dangerous and suffering from a treatable "mental illness" as technically defined. Compare *Foucha*, 504 U.S. at 78-80 (commitment unconstitutional where patient is *neither* mentally ill or diseased *nor* dangerous) with *Allen*, 478 U.S. at 366 (commitment constitutional where patient suffered from mental disorder, had propensities to commit sex offenses, and had demonstrated such propensities). See also *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270, 270-271 (1940) (upholding statute providing for civil commitment of those with "psychopathic personality," interpreted as "those persons who, by habitual course in misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or

other evil on the objects of their uncontrolled and uncontrollable desire"); *Jackson* 406 U.S. at 728 n.6 (commenting that civil commitment of "feeble-mindedness" not problematic).

Rather, the issue is whether the condition — however defined — that poses the danger has abated. Thus, for example, Justice O'Connor in *Foucha* referred in more general terms to the State's authority to confine "mental patients" when there is "some medical justification for doing so," without specifying the need for some technical diagnosis of "mental illness" (rather than some other condition that comes within the ambit of mental-health treatment). 504 U.S. at 88. Indeed, to hold otherwise would create an inconsistency with the laws governing civil restraints of liberty rights in analogous circumstances not involving any species of "mental illness" or "insanity," including forcible quarantines of persons suffering from dangerous but purely physical conditions. See 5-6.

Moreover, requiring a finding of "mental illness" as a constitutional minimum for all civil commitment statutes would be tantamount to delegating to the psychiatric profession the ultimate determination of whether any State's civil commitment law comports with the Constitution. Psychiatrists themselves concede that they know of no definition that adequately specifies the precise boundaries of the concept of mental illness. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxi (4th ed. 1994) [hereinafter "DSM-IV"] see *Ake* v. *Oklahoma*, 470 U.S. 68, 81 (1985) ("noting that psychiatrists disagree widely and frequently on what constitutes mental illness"). And the profession expressly disavows any nexus between its diagnostic categories of mental disorders and legal concepts bearing similar monikers. *Id.* at xxvii ("Cautionary Statement" warning that inclusion among diagnostic categories in the DSM-IV "does not imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder, or mental disability"). This is, in part, because of the "imperfect fit" between the questions of ultimate concern to the law and those of the profession and the realization that legal judgments also "take into account such issues as individual responsibility * * * and competency." *Id.* at xxiii, xxvii; see also A. M. Dershowitz, *The Psychiatrist's Power in Civil Commitment: A Knife that Cuts*

Both Ways, 2 PSYCHOL. TODAY 43 (1969) (arguing that defining imposition of civil commitment in medical, as opposed to legal, terms leads to irrational results).

The "imperfect fit" between law and psychiatry also is caused by the fact that nonmedical factors have, historically, influenced which conditions psychiatrists have chosen to characterize as "mental illnesses." See, *e.g.*, D.B. WEXLER, MENTAL HEALTH LAW: MAJOR ISSUES 16 (1981) (noting that in 1851, some psychiatrists labeled slaves in South who refused to work as suffering from "dysaesthesia Aethiopis" and those who fled their masters as suffering from "drapetomania"). This phenomena is not unique to psychiatry; Dr. Oliver Wendell Holmes observed that "'medicine, professedly founded on observation, is as sensitive to outside influence, political, religious, philosophical, imaginative, as is the barometer to the changes of atmospheric density.'" MENTAL INSTITUTIONS, *supra*, at 3 (quoting O.W. HOLMES, MEDICAL ESSAYS 1842-1882 177 (1891). The Court too has noted that nonmedical considerations, such as "social and legal aspects," "are implicit in the definition of mental illness itself." *Humphrey* v. *Cady*, 405 U.S. 504, 509 n.4 (1972).

Neither would be it prudent to stake the constitutionality of a State's civil commitment statute on whether that law expressly limited commitment only to the "mentally ill," even if the definition of the phrase were left to the State. Such a rule would elevate to talismanic significance the phrase "mental illness" — in direct contravention of Court's prudent position that labels or other "magic words" should not be raised to constitutional significance. See *Foucha*, 504 U.S. at 118 n.13 (Thomas, J., dissenting), citing *Railway Express Agency, Inc.* v. *Virginia*, 358 U.S. 434, 441 (1959) (constitutionality of state action should not turn on "magic words"). Moreover, it would unnecessarily limit the States' ability to pursue novel civil commitment policies — even though contemporary medical knowledge may indicate that some patient requirements, like those of the SVPs here, are incompatible with an extant system designed for the "mentally ill."[8]

---

[8] Kansas' current scheme provides a useful example. The Act defines "SVPs" and the "mentally ill" in a mutually exclusive manner. Compare

In the analogous context of criminal insanity, Justice Kennedy has commented:

> "'Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. . . . It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.'"

Foucha, 504 U.S. at 96 (Kennedy, J. dissenting) (quoting *Powell* v. *Texas*, 392 U.S. 514, 536-537 (1968) (Marshall, J., plurality opinion) and citing *id.* at 545 (Black, J., concurring)). This reluctance to constitutionalize the criminal insanity test applies equally here, especially in light of the Alice-in-Wonderland-like quality of the term "mental illness," a phrase which, as demonstrated above, is capable of many meanings depending on who is its "master."[9]

---

§ 59-29a02 (SVP) with § 59-2902(h) (mentally ill). By so doing, Kansas is able to provide SVPs with some procedural protections greater than those afforded the "mentally ill" (compare, *e.g.*, § 59-29a07 ("beyond a reasonable doubt" standard for commitment of SVP) with, *e.g.*, § 59-2917(f) ("clear and convincing" standard for mentally ill)), without running afoul of the Court's equal protection jurisprudence. See *Humphrey*, 405 U.S. at 512 (noting equal protection problems presented by possibility of confinement of an individual under either of two civil commitment statutes, when statutes afford different procedural protections); see also *Jackson*, 406 U.S. at 729-730; *Baxstrom*, 383 U.S. at 110.

[9] "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean — neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master — that's all."

L. CARROLL, THROUGH THE LOOKING GLASS 124 (Macmillan ed. 1928).

E. There Are Medically Recognized Treatments For SVPs.

Contemporary knowledge within the psychiatric field supports Kansas' determination that SVPs could benefit from state-sponsored mental health treatment. Although the psychiatric profession now recognizes numerous promising treatments for SVPs, that has not always been the case. Until the late seventies and early eighties it was generally accepted that a SVP's sexual deviance was the result of an "out of control" sexual drive, that could not be abated by then-known methods of psychiatric treatment. B.K. Schwartz, *Effective Treatment for Sex Offenders*, 22 PSYCHIATRIC ANNALS 315 (1992). In the late seventies, however, the profession began to discover that sexual deviants were not just people with zealous sex drives, but rather suffer from a host of interrelated problems that combine to create an environment compelling them to act out their fantasies.

Viewing the SVP as a mix of psychological and emotional ills encouraged the psychiatric community to try to develop treatments for SVPs:

> "Traditionally, the major emphasis and concern of counselors have been on the psychological and emotional well-being of the victim. It is difficult to dispute the inherent logic in this position; yet logic also dictates that offenders should receive therapeutic attention if the incidence of * * * sexual victimization is to be reduced." Priest, et al., *Counseling Adult Sex Offenders: Unique Challenges and Treatment Paradigms*, 71 J. OF COUNSELING & DEVEL. 27 (1992) (citations omitted).

By the early eighties, the psychiatric community had accepted the notion that "sex crimes are rarely sexually motivated." I.C. Wiederholt, *The Psychodynamics of Sex Offenses and Implications for Treatment*, 18 J. OF OFFENDER REHABILITATION 20 (1992). A significant breakthrough came with Dr. A.N. Groth's classification of two general types of SVPs, the "fixated offender" and the "regressed offender." Priest, et al. *supra*, at 28. He identified the fixated offender, whose attraction often focuses on children, as suffering from an arrest of psychological maturation. Meanwhile, the regressed offender, whose maturation process may be quite

normal, suffers from a temporary compulsion toward immature behavior brought on by stress or trauma. Not surprisingly, the psychotherapeutic treatments that each one requires are vastly dissimilar.

Dr. Groth's advances in the understanding of the mental dynamics of sexual deviance and his classification of those dynamics into two categories did not, alone, solve the riddle of how to treat SVPs. Although categorization of conduct is helpful, need for individual treatment is critical to address the unique nature of each SVP. See Pfafflin & Friedemann, *What is in a Symptom? A Conservative Approach in the Therapy of Sex Offenders*, 18 J. OF OFFENDER REHABILITATION 16 (1992). Thus this group of offenders (SVPs) is not a homogenous group of sexual deviants, but rather a varied group of stories, as myriad as the number of people inflicted with the debilitation.

It was once argued that penal sanctions produced a type of "shock therapy," as it confronted the SVP with the consequence of his acts. *Id.* at 5. But penal sanctions, though a reasonable and fair penalty for sexually violent acts, treat SVPs as one group with little distinction. Modern psychiatric knowledge recognizes that each SVP has a unique psychic make-up, which includes various "dynamics of physical arousal and distorted emotional needs." Schwartz, *supra*, at 318. To address the range of SVPs' emotional deficiencies, psychiatrists have developed specialized treatments specifically tailored to meet the requirements of the individual offenders. Psychiatric treatment, whether with psychotherapy or pharmacotherapy, now provides an individualized program of mental rehabilitation for sexual psychopaths.

Contemporary psychiatric approaches target the SVP's unresolved psychological and emotional issues. Currently accepted methods for treating SVPs include: addressing directly the SVP's deviant sexual fantasies, teaching SVPs methods of self-control, exploring the SVP's own possible sexual abuse and recognizing and treating victimization,[10] addressing cognitive distortion, treating

---

[10] "A theme common to many dangerous sex offenders is a history of abuse and neglect during their formative years, including sexploitation." L.A. French & J.J. Vollman, Jr., *Treating the Dangerous Sex Offenders:*

personality traits and personality disorders, helping the SVP develop a plan to interrupt unhealthy patterns and habits that may lead to sexual deviance, and overcoming denial of sexual problems and helping a SVP take responsibility for his acts. Schwartz, *supra*, at 317. The psychotherapy component of medical treatment for sexual deviance is carried out in many ways, including group therapy, role-playing/role-reversal therapy, covert sensitization (acquiring reactions of repulsion to deviant fantasies and impulses), and cognitive restructuring (confronting denial). Priest, et al. *supra*, at 30-31. By 1992, there were more than over 1,200 programs in the United States for treating SVPs . Schwartz, *supra*, at 318.

There also have been significant advances in the use of drugs for treatment of sexual deviance. Cyproterone acetate, for example, has proven effective in controlling deviant sexual fantasies. V.L. Quinsey & C.M. Earl, *The Modifiable Sexual Preference*, in HANDBOOK OF SEXUAL ASSAULTS: ISSUES, THEORIES AND TREATMENT OF THE OFFENDER 279-295 (W.L. Marshall, et al. eds. 1990). Psychotropic drugs have been found to achieve a modicum of effectiveness, to the extent that a SVP's sexual deviance can be identified as part of an obsessive-compulsive disorder. E. Coleman, et al., *An Exploratory Study of the Role of Psychotropic Medications in the Treatment of Sex Offenders*, 18 J. OF OFFENDER REHABILITATION 76 (1992). It was these advances in psychotherapy and pharmacotherapy that prompted the Kansas Psychological Association to report that most sexually violent offenders respond positively to treatment and can be taught "the skills to control their impulses." Letter to Senator Marge Petty from Tom Locke, Ph. D, Kansas Psychological Association 1-2 (Feb. 3, 1994).

As the above makes clear, modern psychiatry offers a host of beneficial treatments for SVPs. See also W.L. Marshall, et al., *Treatment Outcome with Sex Offenders*, 2 CLINICAL PSYCHOL.

A Clinical/Legal Dilemma, 31 INT'L J. OF OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 62 (1987). Psychotherapy addresses underlying issues like past child abuse in the SVP's youth in order to enable him to break his current cycle of abuse.

REV. 465 (1991) (discussing numerous modern treatment programs); P. Gendreau & R.R. Ross, *Revivification of Rehabilitation: Evidence From the 1980s*, 4 JUST. Q. 349, 381-384 (1987); Henderson & Kalichman, *supra*, at 273-282 (same). Even so, psychiatric knowledge of treatment of sexual deviance is still evolving, and all of the dynamics of sexual psychopathology still are not known. Based on what psychiatrists now know, however, it was well within the Kansas legislature's power to decide that there are effective psychiatric treatments for SVPs available to justify requiring civil commitment for their own benefit as well as society's safety. In rejecting a constitutional challenge to Massachusetts' decision to try to control an analogous dangerous condition then threatening its citizens, this Court explained:

> "It is no part of the function of a court or a jury to determine which one of two modes [of treatment] was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety." *Jacobson*, 197 U.S. at 30 (compelling vaccination for smallpox, even though the medical community was divided as to whether vaccination would stem or exacerbate the epidemic).

As the Court recognized then, nothing in the Due Process Clause of the Fourteenth Amendment denies States the power to make such policy choices.

CONCLUSION

The judgment of the Supreme Court of Kansas should be reversed.

Respectfully submitted.

Of Counsel:
ROBERT TEIR
General Counsel
American Alliance for Rights & Responsibilities
1146 19th Street, N.W.
Suite 250
Washington, D.C. 20036
(202) 785-7844

PHILIP ALLEN LACOVARA
Counsel of Record
MICHAEL E. LACKEY, JR.
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

JAMES C. GEOLY
RYAN D. MEADE
Mayer, Brown & Platt
190 S. La Salle Street
Chicago, IL 60603
(312) 782-0600

AUGUST 1996.